Supreme Court, U.S.
FILED

001236 SEP 25 2000

CASE NUMBER _____

IN THE
SUPREME COURT OF THE UNITED STATES

October 2000 Term

LOWD F. GREENE and NANCY P. GREENE,	)
Petitioners	)
Vs.	)
FIRST BANK, E. CRAIG SASSER, and IRONHORSE AUCTION CO., INC.,	)
Respondents	)

PETITION FOR A WRIT OF CERTIORARI FROM THE
SUPREME COURT OF THE
STATE OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

This the 22nd day of November, 2000

DONALD M. BROWN, JR.
Attorney for Petitioners
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Suite 120, Charlotte, NC 28226
704/542-2525

65pp

QUESTION PRESENTED

Does a "release" of lawsuit rights executed while a party is in the midst of a federal bankruptcy proceeding subsequently prevent that party from bringing a lawsuit in state court, even though the lawsuit rights were subsequently purchased by the party from the bankruptcy estate, and even though the sale of the lawsuit rights was approved by the federal bankruptcy judge?

PARTIES TO THE PROCEEDING

Donald M. Brown, Jr.
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Nancy P. Greene

And

J. Alexander S. Barrett
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E. Craig Sasser

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Statement of Jurisdiction

The opinion of the North Carolina Court of Appeals, not designated for publication, appears as Appendix A to this petition. The Order of the North Carolina Supreme Court, dismissing the appeal from the North Carolina Court of Appeals and denying the petition for discretionary review, dated June 26th 2000, is found as Appendix B.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257, which states that writs will be issued from "final judgments and decrees rendered by the highest court of a State in which a decision could be had."

Federal Statutory Provisions Involved

11 U.S.C. § 541(a)(1) provides in relevant part that:

Sec. 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 541(c)(1) provides in relevant part that:

Sec. 541. Property of the estate

(c)

(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1),

(a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law –

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects

or gives an option to effect a forfeiture, modification, or

termination of the debtor's interest in property.

11 U.S.C. § 363(b)(1) provides in relevant part that:

> **Sec. 363. Use, sale, or lease of property**
>
> (b) (1) The trustee, after notice and hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

Statement of The Case

This case highlights the age-old struggle between state and federal law, in this instance featuring the federal bankruptcy code pitted against state contract and procedural law.

The origins of this struggle date back to the late 1980s in rural Stanley County, North

Carolina, where Mr. and Mrs. Greene, the petitioners, operated a subcontracting business known as "Greene's Overhead Doors, Inc." At that time, the Greenes owned a considerable amount of rural property which they had spent a lifetime accumulating.

Having been successful in business and well known in their community, the Greenes in 1989 were approached by officers of the Respondent First Bank who wanted to loan the Greenes money for business expansion. Under the proposal forwarded by Bank officers, the Greenes would use all of their rural real estate as collateral for loans and lines of credit.

According to the Greenes, bank officers, including E. Craig Sasser, promised that future financing would be available in an amount approaching the fair market value of the real estate, which at the time was approximately $943,000.00. Based on the officers' inducements, the Greenes did in fact collateralize their real estate under one loan to First Bank, and closed on a $450,000.00 loan on November 22, 1989.

Circa 1990 – 1991, the economic recession, which bankrupted thousands of American businesses, began to negatively affect Greene's Overhead Doors. In need of additional funding to remain competitive in a constricting market, the Greenes approached First Bank.

To the Greenes' dismay, however, and despite Mr. Sasser's promise to make funding available up to and approaching the fair market value of collateralized real estate, the bank refused. To make matters worse, the bank, without the Greenes' permission, wrote letters to the Greenes customers announcing that the Greenes were behind on their $450,000 loan to the bank and instructing the customers to make all payments directly to the Bank instead of the Greenes.

The Bank's actions devastated Greene's Overhead Doors, and as the Bank foreclosed upon and commenced to sell their real estate at auction, the Greenes filed Chapter 13 bankruptcy on February 8, 1993. The Greenes, who contended that the Bank had breached its promise of future funding and tortiously interfered with their business

relationships, hired counsel in an effort to effectuate a compromise during the course of the bankruptcy proceeding. The case was converted to Chapter 11 on April 19, 1993. As part of the negotiations, on May 28, 1993, the parties signed an agreement by which the Greenes agreed in part to "release First Bank ... from any and all actions, causes of actions, claims, demands, damages, costs or expenses on account of any matter arising prior to May 27, 1993. A copy of the May 28th release is attached hereto as Appendix C.

The Greenes contended that the release would apply only if the case could successfully have been completed under Chapter 11. Unfortunately, however, the bankruptcy case was converted to Chapter 7 on September 17, 1993. The trustee, pursuant to 11 U.S.C. § 363(b), on September 8, 1994, moved the Bankruptcy Court for an Order authorizing the sale of "certain causes of action against First Bank." A copy of this order is attached hereto as Appendix D.

On September 21, 1994, Petitioner Dowd F. Greene entered into a bankruptcy auction bidding against First Bank for the

right to purchase the cause of action. At the conclusion of the bidding, United States Bankruptcy Judge William A. Stocks entered an Order directing the trustee to "sell the alleged causes of action against First Bank to Dowd F. Greene, Jr. for the sum of One Thousand Dollars." (See Appendix D attached hereto).

Having purchased the causes of action from the estate pursuant to court order, the Greenes on October 2, 1995 filed a lawsuit in North Carolina Superior Court against the Bank, E. Craig Sasser and Ironhorse Auction Co., Inc. Against the Bank, the Greenes alleged breach of contract, unfair and deceptive trade practices, tortious interference with contract and unlawful conversion.

On October 21, 1996 Superior Court Judge William Helms granted summary judgment in favor of First Bank and Sasser. (See Appendix E attached hereto). Judge Helms made no findings supporting his order, other than "there is no genuine issue of material fact", leaving petitioners to speculate upon his reasoning.

After petitioners filed Notice of Appeal to the North Carolina Court of Appeals, the Court issued an Opinion citing the "release" of 28 May 1993 as reason for affirming summary judgment. (Appendix A, pages 7 – 8). The Court of Appeals does not, however, address or even mention the legal effect of the subsequent order of September 21, 1994 selling the lawsuits to Dowd Greene. As the North Carolina Supreme Court has denied certiorari, Petitioners now petition this Court for certiorari.

Argument

The "release" on which the North Carolina Court of Appeals affirms summary judgment is not a valid release of the lawsuit rights, and does not bind nor prohibit Mr. Greene from pursuing his cause of action which he purchased pursuant to Court order in 1994. This is in large part because the property, i.e. the lawsuit rights, belonged to the bankruptcy estate and not the Greenes. The Greenes could not contractually release something they do not own.

In fact, the Greene's inability to relinquish or release their rights by contract is addressed at Section 541(c) of the Bankruptcy Code, wherein contractual relinquishment of property owned by the bankruptcy estate is addressed.

To that extent, 11 U.S.C. § 541(c)(1) provides in relevant part that ... an interest of the debtor in property *becomes property of the estate . . . notwithstanding any provision in an agreement*, transfer instrument, or applicable nonbankruptcy law .... (A) *that restricts or conditions transfer of such interest by the debtor*, or that *effects or gives an option to effect a*
forfeiture, modification, or termination of the debtor's interest in property. (Emphasis added).

Thus, the lawsuit rights remained the property of the bankruptcy estate despite the alleged "release" on which the Court of Appeals affirms summary judgment. Notwithstanding the provisions of Section 541, the Greenes, as parties in bankruptcy, could no more have contractually disposed of lawsuit rights than they could have sold their

rights to the Statute of Liberty. In either case, regardless of whether a Bankruptcy Judge signed the "release", the Greenes could not dispose of property via contract that they did not own.

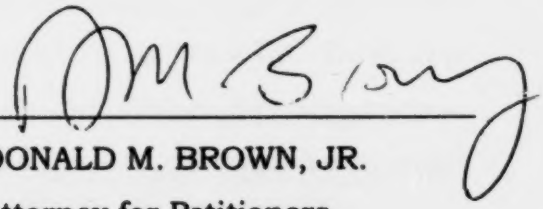
Moreover, 11 U.S.C. § 363(b), which the bankruptcy trustee cited in her motion to sell the causes of action, *is the only statutorily approved procedure for removing lawsuit rights from the estate under these circumstances.* The alleged "release" on which summary judgment was affirmed did not comply with federal bankruptcy procedure in disposing of assets of the estate. This is because other creditors of the estate, above and beyond First Bank, were entitled to notice and an opportunity to bid on the lawsuit rights, which was finally afforded on 21 September 1994, in accordance with federal law and pursuant to the trustee's motion.

First Bank's attempt on May 28, 1993 to circumvent the process and deny other creditors the right to bid on the lawsuits was contrary to federal bankruptcy law and cannot now be used as a shield to block Petitioners from proceeding. Moreover, because the

Greenes agreed to "release" property they did not own, there was no contract for lack of consideration.

Conclusion

Petitioners have therefore properly acquired their rights to pursue a lawsuit against Respondents under federal bankruptcy law, and the purported "release" of 1993 is invalid under federal bankruptcy law. For these reasons, the United States Supreme Court should issue a writ of certiorari to the North Carolina Supreme Court and consider petitioners' argument that their rights under the federal bankruptcy court's order of September 21, 1994, have been illegally denied.



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Appendix A

Slip Opinions of the North Carolina Court of Appeals

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IN THE JUSTICE OF
CLERK COURT OF APPEALS
OF NORTH CAROLINA

COA99-381

NORTH CAROLINA COURT OF APPEALS

Filed: 15 February 2000

DOWD F. GREENE and
NANCY P. GREENE,
Plaintiff-Appellants,

v.

Stanly County
No. 95 CVS 769

FIRST BANK, E. CRAIG
SASSER, and IRONHORSE
AUCTION CO., INC.
Defendant-Appellees.

Appeal by plaintiffs from judgment entered 21 December 1998 by Judge Sanford L. Steelman, Jr. in Stanly County Superior Court. Heard in the Court of Appeals 18 November 1999.

Brown & Associates, *PLLC*, by Donald M. Brown, Jr., for plaintiff-appellants.

Adams, Kleemeier, Hagan, Hannah & Fouts, by J. Alexander S.Barrett and James W. Bryan, for defendant-appellees.

McGEE, Judge.

Plaintiffs and their construction company, Greene's Overhead Doors, Inc. (Greene's Doors), executed two promissory notes in favor of defendant First Bank, one for $450,000 and the other for $50,000, both dated 17 November 1989. The notes were secured by a deed of trust on all real property owned by plaintiffs in Stanly County, North Carolina, which was valued at $943,500, and by a security agreement which included the inventory and accounts receivable of Greene's Doors as collateral. Plaintiffs agreed to make quarterly payments to First Bank of $16,974.74 on the $450,000 loan, and monthly interest payments on the $50,000 loan with the full principal balance due 17 November 1990.

Between May 1990 and January 1992, plaintiffs requested additional financing from First Bank for their business, but the bank

refused. Plaintiffs insist that during the execution of the loan, First Bank had orally promised plaintiffs future advances in excess of the $500,000 represented by the promissory notes. First Bank and E. Craig Sasser, an officer of First Bank who negotiated for the bank, deny having made any such promise. Between September 1990 and January 1992, plaintiffs requested from the bank a release of real property encumbered by the deed of trust, but the bank refused. By early 1992, plaintiffs were in arrears on their loans with First Bank.

In August 1992, plaintiffs planned to sell some of their real property at an auction to be held in the fall of that year. First Bank and Mr. Sasser recommended that plaintiffs contact defendant Ironhorse Auction Company (Ironhorse) to conduct the auction, and plaintiffs did so. In a letter dated 2 September 1992, the bank informed plaintiffs that they were in default on the $450,000 note and that the bank had accelerated the full amount due on the note, resulting in a demand for payment of

$512,943.82. The following month, October 1992, plaintiffs entered into a contract with Ironhorse to conduct the auction.

In early November 1992, First Bank served plaintiffs with a notice of foreclosure. Although the auction was conducted by Ironhorse on 7 November 1992, no sale of plaintiffs' real property was actually completed. At the foreclosure hearing on 2 December 1992, the Stanly County Clerk of Court ordered a sale on 9 February 1993 of all plaintiffs' secured property. Plaintiffs' commercial building was not secured by the deed of trust because when plaintiffs stated earlier that they had located a buyer who would pay $250,000 for the building, First Bank had agreed to release it.

In a letter dated 11 December 1992, First Bank requested from Greene's Doors a listing of all inventory currently held and all accounts receivable. Plaintiffs allege that they told the bank not to contact customers of Greene's Doors, particularly Robert Yates Racing, Inc. (Yates), in that Greene's Doors had promised to pay the bank upon receipt of payment from

Yates. Nevertheless, First Bank informed Yates of plaintiffs' default and requested that Yates make future payments jointly to Greene's Doors and the bank.

In January 1993, prior to the foreclosure sale scheduled for 9 February 1993, First Bank considered and eventually accepted a proposal made by plaintiffs that the bank dismiss its foreclosure proceedings if plaintiffs produced a "down payment" of $50,000, followed by quarterly payments of $35,000. As documents were being prepared to complete the agreement, plaintiffs filed for

Chapter 13 bankruptcy protection in the United States Bankruptcy Court for the Middle District of North Carolina on 8 February 1993. First Bank filed a motion for relief from stay or for adequate protection in the bankruptcy proceeding on 1 March 1993. On 19 April 1993, the bankruptcy court converted plaintiffs' bankruptcy petition to a Chapter 11 reorganization proceeding. The parties reached an agreement on 28 May 1993, the day of the hearing for First Bank's motion for relief from

stay. As consideration for the new agreement, the terms of which were included in a court order signed by the bankruptcy judge, plaintiffs released the bank from "all [ ] causes of action . . . arising prior to May 27, 1993." On 13 September 1993, First Bank notified the bankruptcy court that plaintiffs had defaulted on their obligations under the 28 May 1993 order. Four days later the bankruptcy court entered an order converting the Chapter 11 proceeding to Chapter 7 and appointed a Chapter 7 trustee in the case.

Plaintiffs filed a debtor's claim for property exemptions in the Chapter 7 proceeding on 22 March 1994, with each plaintiff listing $1,000 of personal property as exempt property. In a "notice of debtors filing claim for exempt property" dated 31 May 1994, plaintiffs designated the exemptions as their "true and lawful exemptions [.]" In a letter to counsel for the bank dated 11 June 1994, the bankruptcy trustee stated that she had "abandon [ed]," with the exception of three trucks, the inventory of Greene's Doors, valued at $750. She also stated

that the bank was "free to remove, destroy or sell these items" as it had "a lien" on them.

First Bank asserted in an affidavit that it inspected the building after receiving the letter from the bankruptcy trustee and found only spray cans, nuts and bolts, metal scrap, twenty pieces of untreated lumber and other items having minimal value. In a letter to the bankruptcy trustee dated 8 August 1994, plaintiffs claimed ownership in materials left in the building, including two benches, a vice, a coat rack, a cabinet, pens, pencils and paper. First Bank responded in a letter dated 15 August 1994 that "most, if not all, of those items would have been inventory subject to the bank's security interest." The bankruptcy court entered an order on 21 September 1994 authorizing the bankruptcy trustee to sell to plaintiffs their alleged causes of action against the bank and its employees for $1,000.

On 2 October 1995, plaintiffs filed a complaint against First Bank, Mr. Sasser and Ironhorse in Stanly County Superior Court alleging: (1) breach of contract, breach of

fiduciary duty and negligence by Ironhorse; (2) breach of contract and unlawful conversion by First Bank; (3) tortious interference with contract and business relations by First Bank and Mr. Sasser; and (4) unfair and deceptive trade practices by all defendants. On 25 April 1996, the trial court denied a motion to dismiss filed by First Bank and Mr. Sasser. The same defendants filed a motion for summary judgment with supporting affidavits and bankruptcy documents on 13 September 1996, which the trial court granted on 21 October 1996. Plaintiffs filed notice of appeal on 18 November 1996, and our Court dismissed the appeal on 16 December 1997 as interlocutory. At trial, a jury found in favor of plaintiffs in their claim against Ironhorse and the trial court entered judgment for plaintiffs on 21 December 1998 in the amount of $2,500. In their notice of appeal filed 19 January 1999, plaintiffs appealed from the final judgment entered 21 December 1998 against Ironhorse and from the 21 October 1996 order granting summary judgment in favor of First Bank and Mr. Sasser. Plaintiffs did not

assign error in the record to the trial court's judgment entered 21 December 1998.

Plaintiffs set forth a single assignment of error in the record: "The Order Granting Summary Judgment filed in Stanly County Superior Court on October 21, 1996 is not supported by the evidence of record, or by the findings of fact and conclusions of law." However, in their brief, plaintiffs list four arguments with no reference to any assignment of error. Our scope of review on appeal is confined to a consideration of the single assignment of error set out in the record on appeal in accordance with N.C.R. App. P. 10(a). Plaintiffs' brief does not include a title page, table of contents, table of authorities, or statement of the facts as required by N.C.R. App. P. 26(g) and 28(b). Nevertheless, pursuant to N.C.R. App. P. Rule 2, we will consider the argument in plaintiffs' brief related to their single assignment of error.

A motion for summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, show that there is no genuine issue of material fact for trial and that the moving party is entitled to judgment as a matter of law. In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. N.C. Gen. Stat. § 1A-1, Rule 56 (1999); *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 665, 449 S.E.2d 240, 242 (1994), *disc. Review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995). Plaintiffs argue there is a genuine issue of material fact as to all its claims against First Bank.

Plaintiffs' sole assignment of error states the order granting summary judgment was not supported by the evidence of record, or by the findings of fact and conclusions of law. "A trial judge is not required to make findings of fact and conclusions of law in determining a motion for summary judgment, and if he does make some, they are disregarded on appeal." *White v. Town of Emerald Isle*, 82 N.C. App. 392, 298, 346 S.E.2d 176, 179, *disc. Review denied*, 318 N.C. 511, 349 S.E.2d 874 (1986). "[F]indings of

fact in a summary judgment order are ill advised because they indicate a question of fact was presented and resolved by the trial court." *Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 722, 338 S.E.2d 601, 604, *disc. review denied*, 316 N.C. 374, 342 S.E.2d 889 (1986). In their brief, plaintiffs attempt to argue their assignment of error as a standard challenge to an entry of summary judgment by arguing there is a genuine issue of material fact as to all their claims against First Bank. Even assuming *arguendo* that their assignment of error did contend that there is a genuine issue of material fact, plaintiffs consented to and signed an order in their bankruptcy action stating that:

> The Debtors for themselves, their respective heirs, administrators, executors, successors and assigns, hereby release, acquit and discharge First Bank its directors, officers, shareholders, employees, agents, and independent contractors, from any and all actions, causes of

> action, claims, demands, damages, costs or expenses on account of any matter arising prior to 28 May 1993, with respect to First Bank or any loan by First Bank, and with respect to any actions or omissions to First Bank, including any claims of lender liability by the debtors or Overhead against First Bank. This Agreement shall not release Ironhorse Auction Company.

Plaintiffs argue this release is not effective and does not extinguish plaintiffs' claims against First Bank accruing prior to 28 May 1993. Our Court has stated that where the execution of a release based on valuable consideration is established by the evidence, the release provides a complete defense to an action for damages. *Talton v. Mack Tools, Inc.*, 118 N.C. App. 87, 90, 453 S.E.2d 563, 565 (1995).

Plaintiffs further argue that there was no "meeting of the minds" concerning the scope of the release, relying on their affidavits that the

release was intended to be temporary and apply only while the bankruptcy remained a Chapter 11 proceeding, as opposed to a Chapter 7. Plaintiffs also point to the affidavit of the lawyer who represented them in negotiating the release, offered by the bank in support of its motion, which does not state that plaintiffs' release was permanent. Plaintiffs further argue that their intent was clear in that plaintiffs requested the word "forever" be removed during drafting of the order and that such intent was corroborated by their allowing the bank to reinstate their suit against plaintiffs if they did not satisfy their obligations under the settlement. For these reasons, plaintiffs contend a genuine issue of material fact exists as to the meaning of the release when viewed in a light most favorable to them. We disagree.

A release is subject to avoidance only by a showing that its execution resulted from fraud or a mutual mistake of fact. *Sykes v. Keiltex Industries, Inc.*, 123 N.C. App. 482, 485, 473 S.E.2d 341, 344 (1996). Plaintiffs have not alleged fraud, and the factors to be considered

when determining whether a release has been executed under a mutual mistake are:

> [A]ll of the circumstances relating to the signing must be taken into consideration including the sum paid for the release. A factor to be considered in cases of this kind is whether the question of liability was in dispute at the time of the settlement. The source or author of the mistake is of no consequence if the parties in good faith relied on it, or were misled by it, and the releasor was thereby induced to release a liability, which he would not otherwise have done.

Sims v. Gernandt, 116 N.C. App. 299, 302, 447 S.E.2d 455, 457 (1994), *aff'd*, 341 N.C. 162, 459 S.E.2d 258 (1995) (citations omitted). In this case, First Bank dismissed without prejudice a pending foreclosure action in return for plaintiffs' release, and the settlement was signed by the parties, their counsel and the

bankruptcy judge. A mistake made by plaintiffs, if any, was not a mutual mistake; the parties were not "misled" and plaintiffs were not "induced to release a liability" due to any mutual mistake. Moreover, plaintiffs had the opportunity to memorialize their alleged intent to create only a temporary release by affirmatively stating such intent rather than by merely removing the word "forever."

Finally, plaintiffs argue that the release is not effective in this case because defendants have not proven that plaintiffs' claims for conversion of personal property worth $14,866, interference with plaintiffs' business contracts, and unfair and deceptive practices occurred prior to 28 May 1993. With the exception of the conversion claim, the record is devoid of any facts indicating potential wrongdoing by defendants subsequent to the date of the release. As for the conversion claim, plaintiffs allege in their complaint that "[s]hortly after the Greenes' real property was sole [sic] and on or about March of 1994, agents of First Bank ransacked the commercial building . . . and stole

personal property belonging to the Greene's [sic], of which the bank had no security interest and which was valued at approximately $14,886." "Conversion is the unauthorized assumption and exercise of right of ownership over goods or personal property belonging to another to the alteration of their condition or the exclusion of the owner's rights." *Marina Food Assoc., Inc. v Marina Restaurant, Inc.*, 100 N.C. App. 82, 93, 394 S.E.2d 824, 831, *disc. review denied*, 327 N.C. 636, 399 S.E.2d 328 (1990) (citing *Spinks v. Taylor and Richardson v. Taylor Co.*, 303 N.C. 256, 278 S.E.2d 501 (1981)).

According to plaintiffs' claims for property exemptions filed 22 March 1994, plaintiffs did not claim an interest in personal property located in the commercial building. Rather, they each claimed the same household items, such as a stove, refrigerator, freezer, dryer, furniture, and television. Plaintiffs therefore could no longer assert an ownership interest in any personal property other than the $1,000 of personal and household belongings they claimed as exemptions. Without an ownership interest

by plaintiffs, there could be no conversion as to them. *See id.* Plaintiffs have not forecast evidence to show that any valid claim arose subsequent to their execution of the release.

The trial court did not err in granting summary judgment in favor of First Bank and Mr. Sasser.

Affirmed.

Judges HORTON and EDMUNDS concur.

Report per Rule 30(e).

Appendix B – Order of North Carolina Supreme Court

No. 134P00 TWENTY-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

(Greene v First Bank et al)

DOWD F. GREENE and NANCY P. GREENE
V
FIRST BANK, E. CRAIG SASSER, and IRONHORSE AUCTION CO., INC.

From NC Court of Appeals
(COA99-381)
From Stanly
(95CVS769)

****

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Plaintiff in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the appellee, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is

"Allowed by order of the Court in conference, this the 26th day of June 2000.

s/Freeman, J.

For the Court"

Upon consideration of the petition filed by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 26th day of June 2000.

s/Freeman, J.

For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 26th day of June 2000.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

s/ Carol B. Templeton

Carol B. Templeton
Assistant Clerk

Copy to:
North Carolina Court of Appeals
Mr. Donald M. Brown, Jr., Attorney at Law, For Greene
Mr. J. Alexander Barrett, Attorney at Law, For First Bank, Sasser
Mr. James Bryan, Attorney at Law, for
Mr. Richard G. Buckner, Attorney at Law, For Ironhorse Auction Co., Inc.
Mr. Ralph A. White, Appellate Court Reporter
West Publishing Company
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Seal of the
Supreme Court of
the State of North
Carolina

Appendix C – May 28, 1993 Release (release provisions set out at No. 15)

FILED
MAY 28 12:47 PM '93
U.S. BANKRUPTCY COURT
GREENSBORO, NC
BY s/ FB

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA

IN RE:	)	
	)	
DOWD F. GREENE, JR.	)	Case No. B-93-
	)	10431C-11W
and NANCY PAULETTE W. GREENE,	)	
	)	
Debtors.	)	

ORDER

THIS MATTER coming on to be heard and being heard before the undersigned on the Motion for Relief from Stay or for Adequate Protection filed by First Bank herein pursuant to 11 U.S.C. §361, 362 and Rule 4001 of the Federal Rules of Bankruptcy Procedure; Bruce H. Connors, Esquire, appearing for First Bank and Gail C. Arneke, Esquire, appearing for Debtors, Dowd F. Greene, Jr. and Nancy

Paulette W. Greene; due and proper notice having been given; and it appearing that the parties have resolved and settled all matters at issue herein, and the parties having announced in open Court and consented to the provisions herein; the Court, for good cause shown, makes the following:

FINDINGS OF FACT

1. This matter is a "core" proceeding and this Court has jurisdiction to hear the same pursuant to 11 U.S.C. §157(b) and 1334.

2. On February 8, 1993, the Debtors filed a Voluntary petition under Chapter 13 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Middle District of North Carolina.

3. On November 17, 1989, the Debtors executed a promissory note payable to First Bank in the original principal amount of $450,000.00 with interest at the contract rate of 12.5% per annum (the "First Note"). The Debtors and their wholly owned business, Greene's Overhead Doors, Inc. ("Overhead"), pleaded certain collateral as security for the

First Note, as recited in the Motion for Relief from Stay filed herein. As of May 27, 1993, the principal balance of the First Note is $441,884.55, plus accrued, unpaid interest of $111,872.38.

4. On November 17, 1989, the Debtors executed a promissory note in the amount of $50,000.00 payable to First Bank with interest at 12.5% (the "Second Note"), and the Debtors and Overhead pledged certain collateral to secure the Second Note, as recited in the Motion for Relief from Stay. As of May 27, 1993, the principal outstanding on the Second Note is $49,000.00 plus accrued, unpaid interest of $5,939.85. The notes, deeds of trust, security agreements and loan agreements executed in connection with the First Note and the Second Note (the "Loans") are hereinafter referred to collectively as the "Loan Documents".

5. The Debtors acknowledge the validity and enforceability of the Loan Documents and waive any irregularity in them. The Debtors further acknowledge that they are jointly and severally liable as primary obligors

on the indebtedness to First Bank. The Debtors further acknowledge that this Order and the documents executed in connection herewith are a modification of the Loan Documents and not a new agreement or novation. The Debtors acknowledge that First Bank has a duly perfected and enforceable security interest in the collateral pursuant to the Loan Documents as recited in the Motion for Relief from Stay. Notwithstanding anything herein to the contrary, the provisions of this paragraph shall not be binding upon any party who has not consented hereto, including any other party in interest or any subsequent Chapter 7 Trustee.

6. The Debtors have not made any payments under the First Note or the Second Note to First Bank in more than one year prior to the filing of the bankruptcy or since the filing of the bankruptcy petition, and First Bank has not otherwise been offered adequate protection of its interest in the property. If First Bank's interest in the property is not adequately protected, it will suffer irreparable harm.

CONCLUSIONS OF LAW

7. It is in the best interest of the estate, the Debtors, First Bank and other parties in interest that First Bank be afforded adequate protection of its interest in the Debtors' assets, and that this Order incorporating the terms of the settlement between the parties be entered.

IT IS, THEREFORE, HEREBY ORDERED, ADJUDGED AND DECREED, by and with the consent of the parties, as follows:

8. On or before the close of business on June 10, 1993, the Debtors shall pay to First Bank by cash or certified funds, the sum of $35,000.00, to be applied by First Bank to the Loans in its discretion.

9. Beginning on September 1, 1993, and on the first day of each calendar quarter thereafter, Debtors shall pay to First Bank the sum of $35,000.00 in cash or certified funds, to be applied by First Bank to the Loans in its discretion.

10. For the purpose of determining the amount due under this Order and so long as the Debtors are not in default under the terms of this Order or the Loan Documents, as modified

herein, the interest rate on the two Loans shall be reduced from 12.5% to 8.0%, retroactively beginning March 1, 1992, and the Loans shall bear interest prospectively at the rate of 8.0%. In the event the Debtors are in default under the terms of this Order or the Loan Documents, as modified herein, the original contract interest rate of 12.5% as provided in the Loan Documents, retroactive to the commencement of the Loans, shall apply to all amounts due and outstanding, and the interest rate reduction beginning March 1, 1992 shall be null and void. By June 3, 1993, First Bank will provide an accounting of the principal and interest balance as of May 27, 1993 to reflect the modifications contained in this Order.

11. The Debtors shall pay to First Bank its actual Trustee's fees and commissions, foreclosure expenses, attorneys fees and expenses incurred by First Bank in connection with these Loans, both prior to and after the commencement of these bankruptcy proceedings, which are $17,850.00 as of May 27, 1993. Said sums shall be added to the

principal balance of the First Note and bear interest as provided herein.

12. The Debtors shall list for sale and sell the 140 acre undeveloped tract which is subject to First Bank's security interest. Proceeds of sale, less customary costs of sale and payment of the first mortgage, shall be applied to the First Bank Loans, in inverse order of payment due date. In the event the aggregate gross sales proceeds for the 140 acre tract exceed $300,000.00, and provided that the Debtors are not in default hereunder, any such excess may be retained by the Debtors and the Debtors shall not be obligated to apply such excess proceeds toward the First Bank Loans. In the event that the property has not been sold by the Debtors prior to December 1, 1994, the Debtors shall sell the property at absolute auction, subject only to Bankruptcy Court approval. Debtors shall have a signed contract with an auctioneer within 45 days after December 1, 1994 and the auction shall be held within 120 days after December 1, 1994.

13. On or before June 10, 1993, the Debtors shall cause Overhead to provide to First Bank a listing of all inventory and accounts receivable of Overhead pledged to First Bank, including, with respect to each of the accounts receivable, an aging, mailing address of the account debtor, amount owed, billing date, and payment due date. Such listing of inventories and accounts receivable shall be provided to First Bank on September 1, 1993 and quarterly thereafter. Provided that the Debtors and Overhead shall not be in default hereunder, First Bank shall not contact any account debtors of Overhead or otherwise attempt to exercise its rights as a secured creditor with respect to the accounts receivable, except as provided herein.

14. First Bank shall have the right, upon notice of five business days, and at such time and in such manner as will not unreasonably interfere with the business operations of Overhead, to have its agents perform during normal business hours, an inspection, appraisal and related services upon the real property and to examine the personal

property pledged as collateral for the loans, at the expense of First Bank provided the Debtors are not in default.

15. The Debtors, for themselves, their respective Heirs, executors, administrators, successors or assigns, hereby release, acquit and discharge First Bank, its directors, officers, shareholders, employees, agents and independent contractors, from any and all actions, causes of action, claims, demands, damages, costs or expenses on account of any matter arising prior to May 27, 1993, with respect to First Bank and any loan by First Bank, and with respect to any actions or omissions of First Bank, including any claim of lender liability by the Debtors and Overhead against First Bank. This agreement shall not release Iron Horse Auction Company.

16. Debtors and Overhead shall execute such other or additional documents as First Bank may reasonably request to effectuate the intent and purposes of the agreements set forth in this Order. This paragraph does not enlarge or

expand any rights granted to First Bank under this agreement.

17. Upon the entry of this Order, First Bank shall dismiss without prejudice the pending action entitled First Bank vs. Greene's Overhead Doors, Inc., 93 CVS 327, pending in the Montgomery County General Court of Justice, including the ancillary claim and delivery proceeding; and First Bank shall not file any such action unless the Debtors or Overhead are in default hereunder.

Except as modified herein, the Loan Documents in all respects shall remain in full force and effect.

18. Except as modified herein, the Loan Documents in all respects shall remain in full force and effect.

19. In the event that the Debtors fail to make any payment provided herein or otherwise fail to comply with the provisions of this Order, upon notice to the Debtors, their counsel, and the Bankruptcy Court of such default, without further notice or hearing this Chapter 11 case shall be immediately converted to a case under

Chapter 7 of the Bankruptcy Code, and a Trustee shall be appointed.

20. The provisions of this Consent Order shall be incorporated into a Plan of Reorganization which the Debtors shall promptly file. The provisions of this Order shall survive any conversion, Plan of Reorganization, or dismissal of this bankruptcy proceeding and shall be binding upon the Debtors, Overhead, and First Bank, their successors or assigns.

This the 28 day of May, 1993.

s/ Jerry G. Tart
Honorable Jerry G. Tart
United States Bankruptcy Judge

WE CONSENT AND AGREE TO BE BOUND BY THE FOREGOING:

s/ Dowd F. Greene, Jr.
DOWD F. GREENE, JR.

s/ Nancy W. Paulette Greene
NANCY W. PAULETTE GREENE

s/ Gail C. Arneke, Esquire
GAIL C. ARNEKE, ESQUIRE
N. C. State Bar No. 6486
Attorney for the Debtors

OF COUNSEL:

BURNS AND PRICE
Suite 450 NationsBank Plaza
Winston-Salem, NC 27101
(919) 722-8195

s/ Dowd F. Greene, Jr.
GREENE'S OVERHEAD DOORS, INC.
BY: Dowd F. Greene, Jr., President

s/ Bruce H. Connors
BRUCE H. CONNORS, ESQUIRE
N. C. State Bar No. 6561
Attorney for First Bank

OF COUNSEL:

ADAMS KLEEMEIER HAGAN
HANNAH & FOUTS
P.O. Box 3463
Greensboro, NC 27402
(919) 373-1600

A True Copy
Teste: 5/22/96
William L. Schwenn, Clerk
U.S. Bankruptcy Court
By: s/ J. Martin

Deputy Clerk
North Carolina

Seal of the U.S. Bankruptcy Court
Middle District of North Carolina

Appendix D - Order of Bankruptcy Court dated September 21, 1994

FILED

SEP 21 1994

U.S. BANKRUPTCY COURT

GREENSBORO NC

CJ

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA

IN RE:	)	
	)	
DOWD F. GREENE, JR.	)	Case No. B-93-
	)	10431C-7W
And NANCY PAULETTE	)	
W. GREENE	)	
	)	
Debtors.	)	

ORDER APPROVING MOTION TO SELL ALLEGED CAUSES OF ACTION PURSUANT TO SECTION 363(b) OF THE BANKRUPTCY CODE

This matter coming on for hearing before the undersigned Bankruptcy Judge on September 8, 1994 in Winston-Salem upon the motion of Catharine R. Carruthers, Trustee, pursuant to § 363(b) of the Bankruptcy Code for the entry of an Order authorizing the Trustee to sell certain causes of action against First Bank and this matter having been duly noticed by the Bankruptcy Court and appearing before the Court were Catharine R. Carruthers, Trustee, Stephen A. Mayo, counsel for First Bank, Thomas W. Waldrep, Jr., counsel for Iron Horse and Phillip E. Bolton, counsel for Dowd F. Greene, Jr. After considering the record, statements from the Trustee, statements from the Debtors' counsel, statements from counsel for First Bank, and statements from counsel for Iron Horse, the Court finds and concludes that:

1. This Court has jurisdiction over this matter and the parties thereto pursuant to 28 USC §151 and §1334 and may render such orders and judgments as appropriate in a "Core proceeding" under 28 USC §157(b).

2. The Debtors commenced this proceeding by filing a voluntary petition for relief under Chapter 13 of the Bankruptcy Code on January 8, 1993. The case was subsequently converted to a Chapter 11 proceeding on April 19, 1993, and then converted to a Chapter 7 proceeding on September 17, 1993. Since September 17, 1993, Catharine R. Carruthers has been the duly authorized and acting Trustee. Among the assets of the bankruptcy estate are certain alleged causes of action against First Bank.

3. The Trustee filed a motion for authority to sell to First Bank any and all claims, counterclaims, causes of action, suits, setoffs and demands of any kind or character, in law or in equity, of the Debtor against First Bank, its successors and assigns, and/or employees, whether or not previously asserted, whether known or unknown, liquidated or unliquidated, fixed or contingent, matured or unmatured (hereinafter the "alleged causes of action").

4. Dowd F. Greene, Jr. made a counteroffer to purchase these alleged causes of actions from the Trustee for the sum of One Thousand ($1,000.00) Dollars. At the hearing before the Court the parties agreed to a bidding procedure on these alleged causes of action whereby the initial bid would be the One Thousand ($1,000.00) Dollar bid of Dowd F. Greene, Jr.

5. An auction was conducted and Dowd F. Greene, Jr. was the last and highest bidder for the alleged causes of action against First Bank for the sum of One Thousand ($1,000.00) Dollars.

Based on the foregoing it is ORDERED, ADJUDGED and DECREED that the Trustee is authorized and directed to sell the alleged causes of action against First Bank to Dowd F. Greene, Jr. for the sum of One Thousand ($1,000.00) Dollars.

IT IS FURTHER ORDERED that payment shall be made in good funds on or before ten (10) days after the entry of this Order.

DATED: September 21, 1994.

s/ William L. Stocks
United States
Bankruptcy Judge

A True Copy Teste: 5/22/96
William L. Schwenn, Clerk
U.S. Bankruptcy Court
By: s/J. Martin
Deputy Clerk

IT IS DIRECTED THAT
A COPY OF THIS
ORDER BE SERVED
ON THE PARTIES TO
THIS ACTION BY
s/CATHERINE
CARRUTHERS
AND A CERTIFICATE
OF SERVICE BE FILED
WITH THE COURT
WITHIN 3 DAYS.

Appendix E – Summary Judgment dated October 21, 1996

FILED
96 OCT 21 AH 10:51
STANLY COUNTY, C.S.C

STATE OF NORTH CAROLINA
COUNTY OF STANLEY

IN THE GENERAL
COURT OF JUSTICE
SUPERIOR COURT DIVISION
95-CvS-769

DOWD F. GREENE	)	
And	)	ORDER
NANCY P. GREENE,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
FIRST BANK,	)	
E. CRAIG SASSER, and	)	
IRONHORSE	)	
AUCTION CO., INC.,	)	
	)	
Defendants.	)	

THIS MATTER coming on to be heard and being heard before the undersigned Judge Presiding at the September 23, 1996 Session of the Superior Court for Stanly County upon the Motion for Summary Judgment of the Defendants First Bank and E. Craig Sasser, and the Court having considered the record and the submissions and arguments of counsel for the Defendants First Bank and E. Craig Sasser in support of the Motion, and the submissions and arguments of counsel for the Plaintiffs in opposition to said Motion, it appears to the Court that there is no genuine issue as to any material fact as to Plaintiffs' claims asserted against the Defendants First Bank and E. Craig Sasser and that Defendants First Bank and E. Craig Sasser are entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that summary judgment is granted in favor of the Defendants First Bank and E. Craig Sasser against Plaintiffs

and that this action is dismissed against said Defendants with the costs to be taxed against the Plaintiffs.

This the 30 day of September, 1996.

s/ William H. Helms
William H. Helms, Judge Presiding